IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC.; REACH ONE; TEACH ONE OF AMERICA, INC.,	)	
PLAINTIFFS,	)	
v.	)	**CIVIL ACTION NO.: 3:06-cv-224-WKW**
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)	
DEFENDANT.	)	

DEFENDANT SHERIFF WARREN�S
BRIEF IN SUPPORT OF MOTION TO DISMISS

COMES NOW, Defendant Sheriff David Warren (the "Sheriff" or "Sheriff Warren"), who has been sued in his official capacity as Sheriff of Macon County, Alabama, and submits this brief in support of his Motion to Dismiss and states as follows:

FACTUAL BACKGROUND

The operation of bingo games for prizes or money by nonprofit associations is authorized by the Constitution of Alabama, 1901, Amendment No. 744 (hereinafter, "Amedment No. 744) and by Ala. Act No. 2003-124. Amendment No. 744, cited in the Official Recompilation of Alabama Constitution of 1901 Local Amendments as Constitution of Alabama 1901, Macon County AL, is attached hereto as Exhibit 4. Pursuant to Amendment No. 744, the Alabama

Legislature delegated its authority to promulgate rules and regulations for the licensing and conduct of bingo games to the Sheriff of Macon County. (Comp. at ¶ 6.) Specifically, Amendment No. 744 provides, in pertinent part, that:

> The operation of bingo games for prizes or money by nonprofit organizations for charitable, educational, or other lawful purposes shall be legal in Macon County. The sheriff shall promulgate rules and regulations for the licensing and operation of bingo games within the county. The Sheriff shall insure compliance pursuant to any rule or regulation. . .

Ala. Const. 1901, Amend. No. 744.

A. 2003 BINGO RULES

In accordance with the authority granted to him by the Legislature, the Sheriff promulgated the "Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County" in December of 2003 ("2003 Rules")[1]. (Comp. at ¶ 7.) The 2003 Rules provided for two types of bingo licenses: Class A Bingo License for the conduct of paper bingo, and Class B Bingo License for any and all games of bingo (including electronic bingo). (2003 Rules Section 1). In order to obtain a Class B Bingo License, the nonprofit organization had to complete an application and submit the application package to the Sheriff for approval or denial. (Ex. 1,

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[1]Attached hereto as Exhibit ("Ex.") "1." Plaintiffs only attached selected pages of the 2003 Rules and the Amendments to their Complaint. Sheriff Warren attaches hereto the complete copies of the Bingo Rules and Amendments so that this Court may have the complete documents before it for consideration. The inclusion of the complete copy of these rules, however, does not convert Sheriff Warren's Motion to Dismiss into a Motion for Summary Judgment. 5C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1371 (3d ed. supp. 2005) ("[W]hen the plaintiff fails to attach a pertinent document, it has been held that the defendant can attach that document to a motion for judgment on the pleadings without converting the motion into one for summary judgment."). This Court may consider extrinsic materials without converting the motion into one for summary judgment when: (1) the materials were referred to in and/or attached to the complaint; (2) the materials are central to plaintiff's claims; **and** (3) the parties do not dispute their authenticity. *GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384-85 (10th Cir. 1997) (citing authorities from the First, Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits).

Section 2, 3). The holder of a Class B Bingo License could only conduct bingo games at a "qualified location" in Macon County. (Ex. 1, Section 1(h).) The 2003 Rules defined a "qualified location" as a location that had been inspected and approved by the Sheriff and which had submitted satisfactory evidence of the following:

(i) public liability insurance in an amount not less than $5,000,000.00;
(ii) if liquor is served, liquor liability insurance in an amount not less than $1,000,000.00;
(iii) adequate parking for patrons and employees;
(iv) onsite security as prescribed by the Sheriff;
(v) onsite first aid personnel as prescribed by the Sheriff;
(vi) cash or surety bond in an amount not less than $1,000,000.00;
(vii) such accounting procedures, controls and security monitoring necessary to preserve and promote the operation of the bingo games and to ensure the protection of the charitable license holder and its patrons;
(viii) satisfactory evidence that the owner or owners of the location paid at least $5,000,000.00 for the land, building and other capital improvements (before depreciation) comprising said location or the value of said land, building and other capital improvements (before depreciation) must be at least $5,000,000.00;
(ix) satisfactory evidence that the location is fully compliant with the Americans with Disabilities Act ("ADA");
(x) satisfactory evidence that the owner or owners of such location have been residents of the State of Alabama for at least three (3) years.

(2003 Rules, Section 1(j)) (Comp. at ¶ 8.) The 2003 Rules also establish an appeal process for the denial of an application. (Ex. 1, Section 14.) Section 14 provides that any nonprofit organization whose application for a license has been denied "shall have the right to appeal such denial to the Macon County Commission and to the Circuit Court of Macon County." (Ex. 1, Section 14.) It is important to note that the Plaintiffs do not challenge or contest any portion of the 2003 Rules.

B. 2004 AMENDMENTS TO THE BINGO RULES

On June 2, 2004, the Sheriff amended the 2003 Rules and issued the First Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County ("2004 Amendments")[2]. (Comp. at ¶ 10.) Plaintiffs contend that the Sheriff issued the 2004 Amendments "[w]ithout justification and for no announced reason." (Comp. at ¶ 10.) However, this is patently false.

When the Sheriff promulgated the 2004 Amendments, he included a "Commentary to Amended and Restated Bingo Regulations." (Ex. 2, Commentary to 2004 Amendments). The Commentary highlighted the amendments to the 2003 Rules and explained the rationale behind the decision to amend the 2003 Rules:

> Having had the opportunity to evaluate and regulate the licensing and operation of bingo games in Macon County, Alabama, pursuant to Amendment No. 744 of the Constitution of Alabama, the Macon County Bingo Regulations are hereby amended and restated in their entirety in order to maintain, protect and enhance the integrity of, the viability and the economic benefit derived from, bingo games for the eligible nonprofit organizations in Macon County that offer material charitable and educational purposes in Macon County, Alabama. . .

(Ex. 2, Commentary to 2004 Amendments.) Even though the Plaintiffs only mention two of the amendments, the Sheriff actually made seven amendments that sought to strengthen and protect the integrity of bingo games conducted by nonprofit organizations. (Comp. at ¶ 11)(Ex. 2, Commentary to 2004 Amendments.) The two amendments of which the Plaintiffs complain are: (1) the capital investment amount required for a "qualified location" for the holder of a Class B License was increased from $5,000,000.00 to $15,000,000.00; and (2) the requirement that at least fifteen (15) nonprofit organizations must obtain Class B Licenses prior to authorizing such a bingo operation at a qualified location. (Comp. at ¶ 11)(Ex. 2, Sections 1(j) and 2.)

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[2]A complete copy is attached hereto as Ex. 2.

Contrary to the Plaintiffs' contention that these rules were amended "for no announced reasons," the Sheriff explained in the Commentary that the increased capital investment requirement was necessary in order to: "require a qualified location to prove a significant investment and financial commitment to Macon County prior to becoming a "qualified location"." (Ex. 2, Commentary to 2004 Amendments, Section 1(j).) The Sheriff also explained the rationale for requiring at least fifteen nonprofit organizations to obtain Class B Licenses prior to authorizing Class B Bingo at a "qualified location":

> In order to maximize economic benefits to numerous nonprofit organizations in Macon County and to further avoid the potential abuse of a third party individual or business entity from using one nonprofit organization (or a minimal number) as a "front" to operate bingo games under a Class B License. . . By requiring at least fifteen (15) nonprofit organizations to obtain a Class B License prior to authorizing such a bingo operation at a qualified location, assurance is provided that a large representative group of charities is afforded the opportunity to obtain the economic benefits associated with a Class B License.

(Ex. 2, Commentary to 2004 Amendments, Section 2.)

C. 2005 AMENDMENTS TO THE BINGO RULES

On January 1, 2005, the Sheriff again amended the rules for the licensing and conduct of bingo games and issued the Second Amended and Restated Bingo Regulations ("2005 Amendments")[3]. (Comp. at ¶ 13.) The Plaintiffs object to one of the three amendments in the 2005 Amendments; the amendment which provides that at no time shall there be more than sixty (60) class B Bingo Licenses in Macon County. (Comp. at ¶ 13.) Although the Plaintiffs allege

[3]A complete copy of which is attached hereto as Ex. 3.

that the Sheriff issued the 2005 Amendments "[o]nce again without actual justification, and no announced reason," this is also false. (Comp. at ¶ 13.)

When the Sheriff promulgated the 2005 Amendments, he also provided a Commentary along with the 2005 Amendments. (Ex. 3 at pg. 13.) The Sheriff explained the reasons for the amendments:

> The Attorney General for the State of Alabama has recently conducted an exhaustive investigation and review of gaming activities in the State of Alabama, including but not limited to, bingo games conducted in Macon County, Alabama, pursuant to Amendment No. 744 of the Constitution of Alabama. In response to the Attorney General's recent findings and pronouncements, the [2004 Amendments] are hereby amended and restated to comport and comply with the Attorney General's definition of bingo games and policy to limit Class B bingo gaming activities in Macon County, Alabama, at a reasonable level whereby the Sheriff can more adequately and effectively regulate and enforce the proper conduct of such bingo games. Accordingly, the following changes have been made to the Macon County Bingo Regulations:
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> * * *
>
> Section 2: A new sentence has been added to the end of Section 2 to limit the number of Class B Licenses that may be issued in order to follow the policy of the Attorney General to limit Class B bingo gaming activities in Macon County, Alabama, and to allow the Sheriff to more effectively regulate and enforce the proper conduct of such bingo games.

(Ex. 3 at pg. 13.)

Plaintiff Macon County Investments, Inc. ("MCI") was formed and incorporated on June 2, 2005. (Comp. at Ex. 4.)[4] Plaintiff MCI is a for-profit organization "doing business in Macon County as a real estate development company." (Comp. at ¶ 2.) MCI filed its Articles of Incorporation with the Macon County Judge of Probate on July 14, 2005. (*Id.* at Ex. 4.) Six days later, on July 25, 2005, Plaintiff Reach One, Teach One (Reach One) applied for a Class B Bingo License and designated Plaintiff MCI to be its "qualified location." (Comp. at ¶ 15.) Plaintiff MCI was formed, and Plaintiff Reach One's application was filed, six months after the Sheriff issued the 2005 Amendments to the 2003 Rules. Section 14 of the 2003 Rules provides a process for appealing the denial of an application, and neither the 2004 Amendments nor the 2005 Amendments altered the appeal process. However, it is important to note that as of the date of the filing of Plaintiffs' Complaint, Plaintiff Reach One's application had not been denied and it had not invoked the appeal process. (Comp. at ¶ 16.)[5]

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[4] Plaintiffs attached the application that they submitted to the Sheriff for a Class B Bingo License as an Exhibit to their Complaint. (Comp. at Ex. 4)

ARGUMENT

Plaintiffs' Complaint is due to be denied on two grounds. First, Plaintiffs' Complaint is due to be dismissed for lack of subject matter jurisdiction because: (1) the Plaintiffs' claim is not yet ripe; and (2) the case is moot. Second, Plaintiffs' Complaint is due to be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6) because it fails to state a claim upon which relief can be granted. Specifically, Plaintiffs' Complaint fails to demonstrate that the 2004 and 2005 Amendments to the Bingo Rules are not rationally related to a legitimate government interest and they fail to demonstrate that Sheriff Warren's actions were triggered by a discriminatory motive or purpose.

[5] Although Plaintiffs have phrased their allegations and the relief they seek in such a way that it appears that both Reach One and MCI applied for a Class B Bingo License and that they would both be entitled to a Class B Bingo License if they prevail, this is inaccurate. Amendment No. 744, and the Macon County Bingo Rules, only provide for the licensing of a nonprofit organization for the conduct of bingo. Amendment No. 744 does permit a nonprofit organization to contract with another entity to operate the games and the facility. However, only Plaintiff Reach One applied and could possibly be eligible to obtain a Class B Bingo License (assuming that Plaintiff Reach One met the qualifications). The 2005 Amendments do provide for a Class B Bingo Operator's License, but Plaintiff MCI does not allege that it has applied for such a license or that it would meet the qualifications for the issuance of such a license.

I. PLAINTIFFS' COMPLAINT IS DUE TO BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

Article III of the Constitution limits the jurisdiction of federal courts to the consideration of "Cases" or "Controversies." U.S. Const. art. III, § 2. The "case or controversy" requirement imposes justiciability limitations on federal courts. It is clear from an analysis of Plaintiffs' Complaint and attached exhibits that Plaintiffs cannot meet the threshold requirement of ripeness that is necessary to vest this Court with subject matter jurisdiction. Moreover, this court also lacks subject matter jurisdiction because this Court is unable to grant the Plaintiffs' the relief they seek, thereby rendering their claim moot.

A. Plaintiffs' Claim Is Not Ripe for Adjudication

Plaintiffs' claim is not ripe for adjudication. The ripeness inquiry is a component of justiciability and goes to the subject matter jurisdiction of the federal court. *See Johnson v. Sikes*, 730 F.2d 644, 647 (11th Cir. 1984) ("The question of ripeness affects our subject matter jurisdiction . . . ."). The purpose of the ripeness doctrine is to prevent the federal courts from exceeding their constitutional role by becoming embroiled in hypothetical, abstract disputes and by needlessly interfering in the workings of other branches of government. *See id.* at 648. *See also National Advertising Co. v. City of Miami,* 402 F.3d 1335, 1339 (11th Cir. 2005); *Atlanta Gas Light Co. v. Federal Energy Regulatory Comm'n*, 140 F.3d 1392 (11th Cir. 1998); *Digital Props, Inc. v. City of Plantation*, 121 F.3d 586 (11th Cir. 1997). At its most basic, ripeness is a question of timing. *See Johnson*, 730 F.2d at 648.

1. General Standards for Ripeness

In the context of ripeness, the constitutional and prudential components of justiciability look at distinct yet related questions. *See Hallandale Prof. Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 759-60 (11th Cir. 1991). First, the constitutional element of justiciability asks whether an actual case or controversy sufficient to meet the requirements of Article III exists. *See id.* at 759-60 ("The constitutional aspect of the justiciability analysis focuses on whether an actual "case or controversy" as required by Article III is presented . . . ."). This requires a showing of an existing or imminent injury in fact flowing from the challenged conduct. *Id.* at 760. Although the ripeness doctrine's requirement of an actual controversy stemming from an injury in fact mirrors the standing doctrine's injury in fact requirement, the injury inquiry for purposes of standing and the injury inquiry for purposes of ripeness are distinct. *See Wilderness Soc'y v. Alcock*, 83 F.3d 386, 390 (11th Cir. 1996). The standing injury focuses on the whether the correct parties are before the court and, therefore, looks at who suffered the injury and the sufficiency of that injury. In contrast, ripeness concerns timing and looks at whether the injury is merely speculative or contingent rather than actual or imminent. *See id.*; *Hallandale*, 922 F.2d at 760-63 & n.3; *Johnson*, 730 F.2d at 648-49. This constitutional component of the ripeness inquiry may be rephrased as the question, "Do the conflicting parties present a real, substantial controversy which is definite and concrete rather than hypothetical or abstract?" *Hallandale*, 922 F.2d at 760.

Second, the prudential aspect of justiciability questions the appropriateness of the particular parties litigating the case in federal court at the present time. *See Hallandale*, 922 F.2d at 760 (Noting that "the prudential part [of justiciability] asks whether it is appropriate for this case to be litigated in a federal court by these parties at this time"). More recently, the Eleventh

Circuit, after citing the two-pronged test from *Abbot Laboratories*, then noted that in considering ripeness, courts must consider three related questions. *Digital Props, Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997). The Eleventh Circuit explained as follows:

> Courts must resolve "whether there is sufficient injury to meet Article III's requirement of a case or controversy and, if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decisionmaking by the court."

Id. (quoting *Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995).

2. Application of Ripeness Standards and Caselaw

Applying the general ripeness standards established by the Eleventh Circuit as well as circuit precedent to the present matter, it is clear that the Plaintiffs' claims are unripe for both constitutional and prudential reasons. The Plaintiffs' claims are unripe under the constitutional aspect of ripeness doctrine because they are too speculative or contingent to present an actual or imminent injury in fact sufficient to satisfy Article III's case or controversy requirement. *See Hallandale Prof. Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 760-63 (11th Cir. 1991); *Johnson v. Sikes*, 730 F.2d 644, 648-49 (11th Cir. 1984). Although the Plaintiffs in the present matter allege that Sheriff Warren has not issued the requested bingo permit, he has not denied the permit either. In fact, the Plaintiffs allege that Sheriff Warren has indicated that the permit will be approved. The Plaintiffs' claims, therefore, are nothing more than fears or speculation that the permit will be denied at some unspecified point in the future. Such a contingent or remote injury, though, is insufficient to establish a ripe case or controversy under Article III. *See Hallandale Prof. Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 760-63 (11th Cir. 1991); *Johnson v. Sikes*, 730 F.2d 644, 648-49 (11th Cir. 1984). In the words of the Eleventh Circuit, "[t]he record in this case does not indicate any injury currently being suffered . . . and the future effect of the [sheriff's] rulings [on the bingo permit application] is speculative." *Johnson v. Sikes*, 730 F.2d 644, 649 (11th Cir. 1984). Furthermore, a "decision not to render an opinion advising what the law would be on an assumed set of facts is also consistent with the well-established rule that a court is never to 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & P. S.S. Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885))). The absence of a concrete, final decision by Sheriff Warren regarding the bingo permit application also renders the Plaintiffs' claims unripe under the prudential aspect of the ripeness doctrine because the absence of a definite factual record makes a well-reasoned decision impossible. *See Hallandale Prof. Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 763 (11th Cir. 1991).

Cases applying the "fitness" and "hardship" analysis frequently used by the Eleventh Circuit in evaluating ripeness have reached the same result. *See Association for Children for Enforcement of Support, Inc. v. Conger*, 899 F.2d 1164 (11th Cir. 1990) (finding dispute unripe because claim was predicated on predicted future action). For example, in Conger, the Eleventh Circuit rejected as unripe a claim that a judge's purported policy of excluding observers from child support hearings violated the Fourteenth Amendment to the United States Constitution. *See id.* at 1165-66. The Eleventh Circuit found that the case was "clearly not fit for judicial decision" and explained as follows:

> Thus, appellants' claims must be based on what they *predict* will happen as a result of Judge Conger's policy should they attempt, at some time in the future, to enter Judge Conger's courtroom during a support hearing. This is plainly the type of hypothetical case that we should avoid deciding. We do not generally decide cases based on a party's predicted conduct. Of course, "[i]f the injury is certainly

> impending, that is enough." *Rail Reorganization Act Cases*, 419 U.S. 102, 143, 95 S.Ct. 335, 358, 42 L.Ed.2d 320 (1974) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S.Ct. 658, 663, 67 L.Ed. 1117 (1923)). In this case, however, we are faced only with an unofficial "policy" announced in an informal setting. We simply cannot know whether Judge Conger will enforce this policy until he actually does so.

Id. at 1166. In the present case, Sheriff Warren has never indicated that the Plaintiffs' bingo permit application will be denied; in fact, the Plaintiffs assert that Sheriff Warren has indicated that the permit application will be approved. Thus, the Plaintiffs' "injury" in the present case is even more hypothetical than in *Conger*.

The *Conger* court went on to find that a delay in federal court review of the constitutional claims in that case would not impose any hardship because of the speculative nature of those claims. *See id.* The Eleventh Circuit found that "waiting to adjudicate the appellants' constitutional claims until Judge Conger actually excludes the appellants from support hearings will not place a substantial burden on the parties" because "requiring the appellants to wait until Judge Conger excludes them from the courtroom saves all of the parties the expense of prosecuting and defending a frivolous claim." *Id.* Here, making the Plaintiffs' wait to bring their federal constitutional claims until Sheriff Warren actually denies the bingo permit (if he does) would serve a similar purpose. Thus, the an analysis of the plaintiffs' claims in the present matter using the two-pronged "fitness" and "hardship" test for ripeness would probably result in a finding that the plaintiffs' claims are unripe.

This conclusion is further supported by the Eleventh Circuit's decision in *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586 (11th Cir. 1997) , which applied the two-pronged "fitness" and "hardship" analysis to find unripe a permit applicants' failure to obtain a final, conclusive decision rejecting the application in a case closely analogous to the present matter. In *Digital Properties*, a land owner brought suit in federal court after allegedly being told by a non-supervisory city zoning technician that the owner's proposed use was not permitted. *See Digital Props.*, 121 F.3d at 588-89. However, the owner never obtained a formal, final administrative decision before suing the city. *See id.* at 590. The court noted that "[i]n order for the city to have 'applied' the ordinance to Digital, a city official with sufficient authority must have rendered a decision regarding Digital's proposal." *Id.* The Eleventh Circuit then held that the owner's "impatience precluded the formation of a concrete case or controversy" because "[w]ithout the presentation of a binding conclusive administrative decision, no tangible controversy exists and, thus, we have no authority to act." *Id.* In light of *Digital Properties*, Plaintiff Reach One's failure in the present case to obtain a final decision from Sherif Warren clearly and definitely rejecting the bingo permit application and their failure to exhaust the available administrative remedies renders the Plaintiffs' claims unripe.

More recently, the Eleventh Circuit considered the ripeness for federal judicial review of a similar state permitting dispute in another case with a posture highly analogous to the present matter and found the case unfit for review. *See National Advertising Co. v. City of Miami*, 402 F.3d 1335 (11th Cir. 2005) (noting that in "determining if a claim is ripe for judicial review, we consider both constitutional and prudential concerns"). In *National Advertising*, an applicant for a zoning permit sued the City of Miami for alleged violations of the First Amendment and the Fourteenth Amendment to the United States Constitution after the city's zoning clerks failed to issue seven requested permits for billboards. *See National Advertising*, 402 F.3d at 1337-38. The clerks did not issue the permits because the proposed billboards supposedly exceeded height limitations and a zoning clerk also orally informed National Advertising that billboards were not allowed in the zone in which the proposed billboards were to be placed. *See id.* at 1338.

However, the district court granted summary judgment to the city after finding that National City's claims were unripe because National Advertising never obtained a written denial of its applications. *See id.* at 1337-38. The Eleventh Circuit readily affirmed the lower court after "agree[ing] with the district court that National fails to present an actual case or controversy that is ripe for judicial review." *Id.* at 1341.

National Advertising is analogous to the present matter given that MCI has failed to obtain a final, written denial of its application for a bingo license. *See id.* at 1340. The only material fact that is different actually counsels against ripeness; as noted, unlike *National Advertising*, the Plaintiffs in the present matter assert that Sheriff Warren has indicated that the application will be approved. *Cf. id.* (finding case unripe even though lower level functionaries indicated that applications would be denied). Given the similarities between the *National Advertising* case and the present matter, a more detailed analysis of the Eleventh Circuit's rationale is warranted.

In affirming the district court's ripeness determination in *National Advertising*, the Eleventh Circuit considered both the fitness of the controversy for immediate judicial review and the hardship attendant to a delay of that review. With regard to fitness, the Eleventh Circuit initially observed that "[w]hen a court is asked to review decisions of administrative agencies, it is hornbook law that courts must exercise patience and permit the administrative agency the proper time and deference for those agencies to consider the case fully." *National Advertising*, 402 F.3d at 1339. The Eleventh Circuit continued by finding that National City's claim was not ripe because it failed to follow the administrative process provided in that it never obtained "a final, written denial of [its] applications" from an official with the authority to bind the city conclusively. *Id.* at 1340. In the present matter, Plaintiff Reach One similarly failed to obtain a final, written denial from the one person with the authority to bind the Sheriff's Department, Sheriff Warren. Thus, like the plaintiff in *National City*, Plaintiff Reach One probably cannot meet the "fitness prong" of the Eleventh Circuit's ripeness inquiry.

In addition, Plaintiff Reach One also appears unable to meet the "hardship" prong of the ripeness test. With respect to hardship, the Eleventh Circuit in *National City* found none and chided the plaintiff for failing to take advantage of administrative remedies. *See National Advertising*, 402 F.3d at 1341. The Eleventh Circuit found as follows:

> We agree with the district court that National has failed to produce evidence demonstrating that it would sustain undue hardship as a result of withholding court consideration. It would have been far easier, and quicker, for National to have exhausted its administrative remedies or received a final written denial of its application instead of rushing to the federal courts for relief.

Id. Similarly, in the present matter, Plaintiff Reach One has not availed itself of the administrative appeal process found in Section 14 of the bingo regulations. Consequently, Plaintiffs cannot meet either prong of the two-part version of the Eleventh Circuit's ripeness test.

B. This Court Lacks Subject Matter Because Plaintiffs' Claim Is Moot

This Court is unable to accord meaningful relief to the Plaintiffs because, even if this Court were to determine that the 2004 Amendments and the 2005 Amendments to the bingo rules violated the equal protection clause of the fourteenth amendment, this Court cannot grant the Plaintiffs the relief they request because Plaintiff Reach One's application is incomplete.

The "case or controversy" requirement imposes justiciability limitations on federal courts, including mootness. *See Soliman v. United States ex rel. INS,* 296 F.3d 1237, 1242 (11th Cir.2002). The doctrine of mootness is derived from the "case or controversy" requirement found in Article III of the Constitution because "an action that is moot cannot be characterized as an active case or controversy." *Adler v. Duval County Sch. Bd.,* 112 F.3d 1475, 1477 (11th

Cir.1997). The question of mootness is a threshold inquiry in every case. The Supreme Court has explained, "the question of mootness is ... one which a federal court must resolve before it assumes jurisdiction." *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). If a plaintiff presents a moot case to a district court, the court must dismiss the case because any decision on the merits would constitute an impermissible advisory opinion. *Al Najjar v. Ashcroft,* 273 F.3d 1330, 1336 (11th Cir. 2001); *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.,* 225 F.3d 1208, 1217 (11th Cir. 2000).

District courts lack the power to decide a case on the grounds of mootness if a decision cannot affect the rights of the litigants in the case. *Rice,* 404 U.S. at 246, 92 S.Ct. at 404; *see also Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969) ("[A] case is moot when ... the parties lack a legally cognizable interest in the outcome."). The Eleventh Circuit has concluded that a case must be dismissed as moot if the court can no longer provide "meaningful relief." *Fla. Ass'n of Rehab. Facilities,* 225 F.3d at 1216-17. Therefore the initial question before this Court is whether it is capable of granting the Plaintiffs the relief they seek.

In the instant case, Plaintiffs request this Court to: (1) invalidate certain amendments to the 2003 Bingo Rules, and (2) compel the Sheriff to issue Plaintiffs a Class B Bingo License pursuant to the 2003 Bingo Rules. (Comp. at ¶¶ A, B.) However, Plaintiffs are not entitled to the relief they seek because Plaintiff Reach One is the only entity in this case that has submitted an application for a Class B Bingo License and is the only entity in this case that could possibly obtain a Class B Bingo License. Most importantly, Plaintiff Reach One's application is incomplete. Therefore, even if this Court compelled the Sheriff to evaluate Reach One's Class B Bingo License application under the 2003 Bingo Rules, Plaintiff Reach One's application fails to satisfy even those requirements.

In order for Reach One, Teach One to obtain a Class B Bingo License under the 2003 Rules, Plaintiff Reach One, Teach One must conduct bingo at a "qualified location." Plaintiff Reach One, Teach One states that it has entered into a contract with Plaintiff MCI to operate the facility where Class B bingo would be conducted. (Comp. at ¶ 15.) Plaintiff MCI admits, however, that it does not currently have a facility. (See Comp. at ¶ 17)(stating that "MCI has purchased land for the facility, began construction of the facility and negotiated financing to purchase games for the operation of the facility.") Moreover, it is evident from the face of the Reach One's application that it has failed to provide satisfactory evidence of eight of the ten requirements under the 2003 Bingo Rules. (Comp. at Ex. 4.)

Specifically, Reach One's application package lacks satisfactory evidence of: (1) public liability insurance of at least $5,000,000.00; (2) if liquor is served, liquor liability insurance of at least $1,000,000.00; (3) adequate parking for patrons and employees; (4) onsite security as prescribed by the Sheriff; (5) onsite first aid personnel as prescribed by the Sheriff; (6) accounting procedures, controls and security monitoring necessary to preserve and promote the operation of the bingo games and to ensure the protection of the charitable license holder and its patrons; (7) satisfactory evidence that the owner or owners of the location paid at least $5,000,000.00 for the land, building and other capital improvements comprising said location; and (8) satisfactory evidence that the location is fully compliant with the ADA. Therefore, the Reach One would not be entitled to the issuance of a Class B Bingo License even if the Court rolled back the 2004 Amendments and the 2005 Amendments because of the deficiencies in Reach One's application.

II. PLAINTIFFS' COMPLAINT IS DUE TO BE DISMISSED BECAUSE THEY FAIL TO STATE A CLAIM FOR VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Second, Plaintiffs' Complaint is due to be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6) because it fails to state a claim upon which relief can be granted. Sheriff Warren acknowledges that courts are reluctant to grant motions to dismiss, and the Plaintiffs' burden for surviving a motion to dismiss is exceedingly low. *Kuhn v. Thompson*, 304 F.Supp, 2d 1313 (M.D. Ala. 2004) However, Plaintiffs Complaint cannot meet this "exceedingly low" standard because their Complaint fails to state a claim for violation of the Equal Protection Clause upon which relief can be granted. Specifically, Plaintiffs' Complaint fails to demonstrate that the 2004 Amendments and the 2005 Amendments are not rationally related to a legitimate government interest and they fail to demonstrate that Sheriff Warren's actions were triggered by a discriminatory motive or purpose. *Snowden v. Hughes* , 321 U.S. 1, 8 (1944); *Kuhn,* 304 F.Supp, 2d at 1332; *Arrington v. Dickerson*, 915 F.Supp. 1503, 1509 (M.D. Ala. 1995).

Plaintiffs allege that the Sheriff has "clearly denied Plaintiffs MCI and Reach One, Teach One equal protection under the laws. Further, there is no rational basis for the differential treatment of the Plaintiffs and the one Class B Bingo facility currently operating in Macon County." (Motion at ¶ 12.) Essentially, Plaintiffs argue that the 2004 and 2005 Amendments promulgated by the Sheriff violate the Equal Protection Clause because those Amendments effectively "preclude applicants post June 2004 from obtaining a Class B Bingo license." (Comp. at ¶ 19.)

A. Elements Necessary To Establish a Claim For Violation of the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment requires the government to treat similarly situated persons in a similar manner. U.S. Const. Amend. XIV, § 1. When legislation does not infringe upon a fundamental right and does not involve a suspect class, "'equal protection claims relating to it are judged under the rational basis test: specifically, the ordinance must be rationally related to the achievement of a legitimate governmental purpose.'" *Gary v. City of Warner Robbins, Ga.*, 311 F.3d 1334 (11th Cir. 2002) quoting *Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000) cert. denied 532 U.S. 978, 121 S.Ct. 1616, 149 L.Ed.2d 480 (2001); *see also, Lofton v. Secretary of the Dept. of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004)(explaining that "[u]nless the challenged classification burdens a fundamental right or targets a suspect class, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest."). Plaintiffs do not contend that they have a constitutional or fundamental right to conduct bingo games. Indeed, numerous courts have held that there is no fundamental right to conduct or play bingo games. *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 242 S.E. 2d 108 (Ga. 1978)(holding that bingo amendment to state constitution did not create a fundamental right); *Bingo Catering and Supplies, Inc. v. Duncan*, 699 P.2d 512 (Kan. 1985); *Durham Hwy Fire Protect. Ass'n, Inc. v. Baker*, 347 S.E. 2d 86 (N.C. App. 1986). *See also*, *Marvin v. Trout,* 199 U.S. 212, 26 S.Ct. 31, 50 L.Ed. 157 (1905)(stating that no one has a constitutional right to operate a gambling business); *Lewis v. United States,* 348 U.S. 419, 423, 75 S.Ct. 415, 418, 99 L.Ed. 475 (1955)(holding that there is no constitutional right to gamble). Moreover, Plaintiffs have not alleged and it is clear that the regulations do not involve a suspect class. Because the present case involves neither a fundamental right nor a suspect class, analysis under the rational basis test is appropriate.

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Lofton*, 358 F.3d 804, 818 (11th Cir. 2004). The government has "'no duty to produce evidence to sustain the rationality of a statutory classification.'" *Id.* at 818 quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993). Instead, one who attacks the legislation bears the burden of negating "every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* (citation omitted). Moreover, courts give great deference to economic and social legislation under the rational basis test. *Id.* at 1339. *Curse v. Director of Workers' Comp. Programs*, 843 F.2d 456,463 (11th Cir. 1998). The Supreme Court has explained:

> [w]hen local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of he statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude, Legislatures may implement their program step by step in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

Pettco Enterprises, Inc. v. White, 896 F. Supp. 1137 (M.D. Ala. 1995)(quoting *New Orleans v. Dukes*, 427 U.S. 297, 303-304 (1976))(citations omitted).

B. The Macon County Bingo Rules Do Not Violate the Equal Protection Clause Because They Are Rationally Related To A Legitimate State Interest, Namely The Regulation of a Gaming Activity.

The Plaintiffs contend that it is a denial of equal protection for the Sheriff to amend the bingo regulations for Macon County to increase the minimum number of applicants required to conduct Class B bingo at a "qualified location" to fifteen (15) and to limit the number of Class B Licenses which can be issued in Macon County to a maximum of sixty (60). Plaintiffs allege that there is no rational basis for these regulations and that the regulations are arbitrary and capricious. However, Plaintiffs contentions are due to be rejected because the 2004 Amendments and the 2005 Amendments are rationally related to the Sheriff, the County, and the State's legitimate interest in protecting the integrity of bingo gaming and in limiting gaming activities in Macon County.

State and local governments, pursuant to their police powers, possess the authority to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community. In addition to these inherent police powers, the Sheriff is specifically authorized by the State Legislature and the citizens of Macon County to promulgate rules which will protect the nonprofit organizations which are conducting the bingo games, the patrons of the bingo establishments, the recipients of the charitable proceeds, and the general welfare of the community.

The Legislature and the Attorney General of Alabama have evidenced a strong desire to carefully regulate and monitor gaming activities in the State of Alabama. The Legislature and the Attorney General have long espoused a policy of limiting bingo gaming activities. This is evident by the fact that it required the ratification of a constitutional amendment in order to permit the conduct of bingo games for charitable purposes in Macon County. The Sheriff was acting against this backdrop when he amended the 2003 Rules for the purpose of imposing additional regulations for the conduct of bingo in Macon County in an effort to prevent the commercialization of operations by establishing a minimum number of nonprofit organizations for each "qualified location" and by limiting the number of active Class B Licensees and to otherwise promote the public welfare consistent with the intent of Amendment No. 744.

The Sheriff included a Commentary to the 2004 amendments which clearly explain the basis for requiring a minimum number of Class B Bingo Licenses which must be issued to nonprofit organizations and conducted at one location before it can be approved as a qualified location. This limitation was rationally related to the Sheriff and the County's interest in ensuring that the "qualified location" was not using one or a minimum number of nonprofit organizations as a "front" for operating a gaming facility. It is also rationally related to the County's interest in making sure that the economic benefits associated with the conduct of bingo games was more evenly distributed.

Likewise, it is clear from the Commentary to the 2005 Amendments that the Sheriff also sought to carefully balance those considerations with the ability to effectively regulate, monitor, and enforce the conduct of bingo games by limiting the number of active Class B Licenses to sixty (60). The 2004 and 2005 Amendments were within the authority delegated to the Sheriff through Amendment No. 744 and the methods that the Sheriff chose were rationally related to a legitimate purpose. Plaintiffs do not cite any cases to the contrary. Therefore, this Court should find that the 2004 Amendments and the 2005 Amendments do not violate the Equal Protection Clause of the Fourteenth Amendment. Accordingly, Plaintiffs' Complaint fails as a matter of law and is due to be dismissed.

WHEREFORE, the premises considered, the Defendant Sheriff David Warren moves this Honorable Court to dismiss the Plaintiffs' Complaint in its entirety.

Dated this 3rd day of April, 2006.

Respectfully submitted,

/s/ Fred D. Gray
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/s/Fred D. Gray, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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/s/ Fred D. Gray, Jr.
OF COUNSEL